

Exhibit 2

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4 IN RE:) No. 18 C 864
5 DEALER MANAGEMENT SYSTEMS)
ANTITRUST LITIGATION.) Chicago, Illinois
) June 10, 2019
) 9:35 A.M.

6 TRANSCRIPT OF PROCEEDINGS - Status and Motions
7 BEFORE THE HONORABLE JEFFREY T. GILBERT, Magistrate Judge.

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1 Clarification on that?

2 MS. MILLER: Your Honor, Britt Miller on behalf of
3 CDK. Two quick questions. One, obviously we did not prepare
4 responses pending the resolution of this motion. So we'd ask
5 for 21 days to respond to the interrogatories in question.

6 And, two, I assume from the tenor of your ruling that
7 the ones that have been served are it. There is no additional
8 ones that are coming. There is no follow-up, additional
9 interrogatories after they get whatever responses. Certainly
10 we'll engage whatever meet and confer process may be necessary
11 as to the responses that we serve. And if there is motion
12 practice on that, we'll certainly engage in it. But to the
13 extent that these are permitted to go forward, these are it.

14 THE COURT: Yes. These are it. And 21 days is fine.

15 MS. MILLER: Thank you.

16 THE COURT: If, with the qualification that you said,
17 that if you object to something and then you meet and confer
18 and then I have to deal with it, in the never-ending discovery
19 dispute process here, I'll do it. But I'm not saying they can
20 serve more or you could serve, I guess, any.

21 MS. MILLER: Understood, your Honor.

22 THE COURT: Okay. That brings me to the issues that
23 you briefed on an expedited basis. I will say, Mr. MacDonald,
24 I very much appreciate the email exchange that you had with
25 Mr. Nemelka in which you remind -- when Mr. Nemelka expressed a

1 desire to get this briefed in time for our June 10th. You sent
2 an email saying, you know, Judge Gilbert has said he would like
3 to have at least a week to look at things. And I didn't know
4 about that because the email that came to my courtroom deputy
5 had a proposed briefing schedule of June 5 and June 7, which
6 was plaintiffs's proposed briefing on this.

7 But I do appreciate at least your consideration of
8 saying, you know, maybe he should have a week to look at this
9 stuff, which he's asked for, in the give and take before filing
10 of the -- this motion. That kind of went by the wayside in
11 some way. But I do appreciate it.

12 And luckily for Mr. Nemelka, I didn't actually go into
13 the ECF system -- I forgot the briefs here, so I had to print
14 them at all home. And I didn't see that you actually didn't
15 even file on June 7th, you actually filed on Saturday, June
16 8th. But that was okay because I was able to read it
17 yesterday. Okay?

18 I want to tell everybody here though -- and you can
19 tell that I have a little bit of an edge here, and I'm sorry
20 about it. Okay? I don't like the fact that I have so
21 many -- I have had so many motions under advisement, which is
22 why I'm trying to rule on as much as I can from the bench.

23 I do have an impression here that there are fights
24 here that don't need to be had. I have had that impression
25 from the very beginning. And I have had the -- I also have the

1 impression, you know, that sometimes positions are taken for
2 tactical reasons without fully thinking through the impact of
3 those positions on your own positions. As an example, I'll
4 talk about these email distribution lists, which I talked about
5 before.

6 So, you know, those types of things, just in my mind,
7 increase the stress and tension in your litigation, increase
8 the stress and tension on the Court, but that shouldn't really
9 be your concern.

10 But I do generally like to have more than a weekend to
11 think about something. The reason that I said I adopted your
12 briefing schedule and also went forward here is I do agree
13 you're entitled to rulings as soon as you can get them, as soon
14 as humanly possible.

15 Had I known my trial from next week was going to
16 settle, I would have moved you there, so I would have had more
17 time to look at this. But I didn't know that. So -- but,
18 anyway, I noticed that. Okay. I noticed that.

19 With respect to the motion pending, I'm going to deny
20 the motion as to the reopening of the 30(b) (6) deposition as of
21 Data Vast. My view of the arguments being made -- and I read
22 the exhibits too, and I read the deposition testimony submitted
23 -- is that defendants's argument is weak and an overreach that
24 Data Vast was a topic that was noticed for 30(b) (6) deposition.

25 This isn't an after-the-fact objection. The objection

1 was raised by counsel at the deposition. The deponent said he
2 wasn't prepared on that. He was general counsel. And so, you
3 know, he would have only been able to -- been required to
4 testify with respect to what he was prepared on.

5 I don't buy the defendants's argument in particular
6 that -- I have to find it. Hold on for a second.

7 (Brief interruption.)

8 THE COURT: Yeah. Defendants kind of shoehorn in to.
9 They say, well, our 30(b)(6) notice defined Authenticom to
10 include any related companies, divisions or subsidiaries, which
11 could include Data Vast. Okay. I get that. That's not
12 necessarily wrong or accelerated. And it included any efforts
13 by Authenticom to secure or protect dealer data or any use of
14 or agreements with third-party vendors to obtain data
15 maintained on a CDK or Reynolds DMS.

16 I don't think we're talking about securing or
17 protecting data really. And if that really was what you were
18 talking about, that's a vague way of saying it for a 30(b)(6)
19 topic. We're not really talking about obtaining data as much
20 as distributing data from the -- that Authenticom got.

21 So I don't think you could shoehorn Data Vast into the
22 served topics. And if this is the best that defendants can do
23 it on it, I think it falls short. I don't think it is worth
24 reconvening a 30(b)(6) deposition to cover this topic with
25 Authenticom's general counsel, particularly when that topic, I

1 think, is being covered in other depositions.

2 I get why defendants want this information, and I get
3 why it is important to their defense and their counterclaims.
4 Talking about Authenticom accessing their systems. But I think
5 you're getting information on that. And I think, you know,
6 again, in the overall theme of, we got to end this at some
7 point, I think this falls on the end of, we should end it.

8 If that was on day one of discovery, maybe I would
9 look at this differently. But it is not. And so I am going to
10 deny the motion as to reconvening the deposition as to
11 Data Vast.

12 With respect to the polling client manager data, I
13 have -- I have some questions for Authenticom here. I think
14 your argument -- well, first of all, let me dispense with a
15 couple of things and focus then on what needs to be focused on.

16 Timeliness. Overrule that objection. This issue has
17 been on the table for some time. You have been chasing each
18 other on this for a while. I read all the correspondence on
19 this. I read the -- you know, what you were talking about.
20 And I don't think this was put to bed. And I think,
21 particularly with the most recent statement, which is that we
22 can't even do this, it is impossible to do it, I just don't
23 think this was tied down.

24 Is this late in the process? Yes. But you have been
25 chasing each other around on this for a long time. And some of

1 the delay, at least from what I can see, is Authenticom's
2 fault, not CDK's fault.

3 Would it have been best for CDK to not -- to tie this
4 down, you know, back in October or November? Yes.

5 Did you do everything you could to help them tie it
6 down? No.

7 So the timeliness document is not working for me.

8 The spoliation issue, not ripe right now. I'm not
9 dealing with that. And that really doesn't come into play with
10 respect to whether you should or shouldn't produce something.

11 But I'm having trouble figuring out exactly what
12 exists. If something exists, my feeling is you have got to
13 produce it. But I'm having -- you know, Authenticom really
14 argued the strawman here, which is we can't produce a report,
15 and we can't produce -- we shouldn't be required to create a
16 document that doesn't exist. I agree with that. It is not
17 clear to me that that's what the defendants are asking for
18 here. It would be -- it sounds to me what the defendants are
19 asking for is a snapshot of what appears essentially on a
20 computer screen when somebody queries the database.

21 So they are not asking to prepare a report per se,
22 they are asking for information that is resident within your
23 system. So it -- you possess it. It is in your possession,
24 custody or control. It is information in your system that is
25 either a seven-day period or it is whatever you had in November

1 of 2018. I think the -- it is not clear to me from
2 Authenticom's response here whether anything exists. Okay?
3 Whether there -- but I have seen what you have produced to them
4 as an example, which I think is exhibit -- I mean, it is quoted
5 in full in the defendant -- the 18 lines are quoted in full in
6 defendants's brief, but -- it's -- is it 16 or --

7 MR. HO: It is an attachment to Exhibit 11.

8 THE COURT: Right. Yeah, it is the last -- yeah. I
9 mean, I see that but I am having trouble figuring out what
10 exists and what is ephemeral or what's tangible.

11 And so I'm going to ask Authenticom at least to
12 explain to me whether -- in particular whether what the
13 defendants are asking for, which is the PCM log for the
14 originally requested seven-day period in November 2018 or a log
15 for the seven days between June 10th and June 16th, which I
16 know is not necessarily within -- you know, before the lawsuit
17 was filed. But I think what they are trying to do is see how
18 does Authenticom's system interact with theirs or what kind of
19 data do you get. I'm not 100 percent sure that I understand to
20 what use they end up putting that. But I could see it being a
21 really nice visual in front of a jury, so I can understand why
22 they might want to see it.

23 But I'm just -- I'm trying to figure out what exists.
24 And I will tell you that if I don't understand what you are
25 saying, Mr. Nemelka or Mr. Ho, then I'm going to appoint a

1 special master to figure out what the heck you should produce,
2 if anything. And you guys are going to split the costs of
3 paying for it because if it is too complicated for me to
4 understand, I'm not going to have days of it.

5 I might need to have a hearing. I might need to have
6 an evidentiary hearing. I might need to put your computer guy
7 on the stand. But I'm going to bring in a special master who I
8 have appointed in other cases, Nora Grossman, who is an expert
9 on e-discovery. And, frankly, when I have appointed her in the
10 past -- I have actually never had to have an evidentiary
11 hearing because she sits down with the parties, speaks the
12 lawyer language because she's a lawyer, and also speaks
13 technical language because she is a technician. And she
14 figures out how the parties can resolve the issue, and I don't
15 ever have to deal with it. But if I have to deal with it, I
16 will.

17 But can you answer my question?

18 Or Mr. Ho.

19 MR. HO: I'm going to try, your Honor. I think there
20 is two aspects to the question of what's available. Temporally
21 my understanding is that what is available is information that
22 goes back seven days. So seven days from today is information
23 that is essentially overwritten. It rolls off after seven
24 days. But it is -- the second aspect of the answer is,
25 importantly, it is not in the database. It is not as if you

1 can query -- type in a query or run a search over a set of data
2 and pull out from a database the information that's being
3 sought.

4 This information is essentially imbedded in the
5 software program itself. And that's why from a legal
6 standpoint more than -- so than a technical one, we think that
7 the rule that governs this is Rule 26(b) (2) (B), and that this
8 clearly falls within the ambit of data that's not reasonably
9 accessible without undue burden or cost. Because some computer
10 programmer actually has to go into the software program and
11 find for every dealer or -- and every day the data that they
12 want. And so seven days doesn't sound like a lot, but when
13 you're talking about hundreds and thousands of dealers, and you
14 have to do it dealer by dealer for every day, as you see they
15 have taken a snap -- the Exhibit 11 that was alluded to is one
16 dealer for one day. So you'd have to do that many, many
17 different times. And it is not something that can be done in
18 an automated way.

19 As Mr. Clements's deposition -- declaration
20 highlights, and this is Exhibit 1 to our opposition, this all
21 has to be done manually by someone who actually -- a computer
22 software person who will actually have to log in to the
23 program. And we don't think that there is good cause to do
24 that.

25 As we highlighted in our opposition brief, we think

1 that this is exactly the kind of data that the Seventh Circuit
2 discovery program and the Sedona Conference and, you know, all
3 the kind of leading authorities about ESI say are presumptively
4 off limits because of the cost and burden involved. And we
5 don't think that the defendants have made the kind of showing
6 that you would need to overcome that.

7 In particular, with respect to relevance, as your
8 Honor has already identified, it -- at best it seems like what
9 the defendants are after is a sense of the kind of information
10 that Authenticom keeps in this, again, very ephemeral way about
11 the way in which its system accesses the DMS.

12 There is not going to be data that covers the relevant
13 time period in this case. It is only seven days long. So at
14 best it is going to be a demonstrative or illustrative set of
15 data. And, frankly, given the limitations on relevance, we
16 don't see how there could be good cause to over -- to justify
17 the imposition of this kind of a burden.

18 We have, as we pointed out, offered to do somewhat
19 more than the one day for one dealer that we have offered. And
20 to the extent that a slightly broader sample or illustrative
21 set could be useful, we have offered to do that.

22 But seven days for all dealers would be a monumental
23 task for a company that has been, frankly, financially
24 decimated by the defendants. We won't go into that again. But
25 Authenticom is a small company, much smaller now than it was

1 before, and simply doesn't have the resources to do this kind
2 of highly time-intensive project.

3 THE COURT: Okay. Couple of questions before I ask
4 the defendants anything. I saw the statement in Mr. Clements's
5 affidavit that Authenticom had to lay off two-thirds of their
6 work force during litigation. So I -- you know, I'm not
7 without appreciation of that.

8 A couple of questions. So what you're saying is that
9 the 18 lines in Exhibit 11, that was obtained by a computer
10 programmer going into one particular -- within a seven-day
11 period one particular dealer's information on the software,
12 taken a screenshot of that. But that would have to be -- if we
13 took a seven-day period, then somebody would have to go through
14 all of the software that ran during that period of time for all
15 of Authenticom's customers and take those same essentially
16 screenshots to comply with the defendants's request, right?

17 MR. HO: I will say I'm not a technical person, so I'm
18 not sure screenshot is exactly the right terminology.

19 THE COURT: Okay. Or a printout.

20 MR. HO: But conceptually that's exactly right.

21 THE COURT: Okay. And how many, roughly, do you know?
22 You said hundreds or thousands. There a difference between
23 hundreds or thousands. We're talking about many dealers?

24 MR. HO: Over time I would --

25 MR. NEMELKA: I don't know exactly today. Authenticom

1 used to service over 10,000 CDK and Reynolds dealers. It has
2 been drastically reduced. I think it is probably low
3 thousands.

4 THE COURT: Okay. And I take it by your response to
5 my question, CDK questions whether something exists in tangible
6 form that had been preserved from November of 2018. Is that no
7 longer -- is that not the case?

8 MR. HO: Your Honor, there were never reports
9 or -- these ephemeral data were never preserved or reduced to a
10 documentary form in the way that we would think of it under
11 Rule 34. With the exception of the one snapshot from December
12 of 2018 that we have then produced to the defendants in March
13 of 2019. So all we would be talking about, as far as I know,
14 is the seven-day period rolling back from today.

15 THE COURT: Okay. I know they are going to have
16 a -- they will have a field day on that particular point, but
17 I'll listen to them.

18 Okay. So we're talking about -- really just talking
19 about a seven-day period now as illustrative of what this would
20 look like. And what you are telling me -- and I think I
21 understand this without having a terribly substantial technical
22 background -- what you are telling me is because this data
23 resides in the software that Authenticom runs on a daily and
24 hourly and minute-by-minute basis, in order to provide even a
25 seven-day snapshot of this kind of polling data, CDK --

1 Authenticom would have to go into the software and physically
2 go in, query through that to find each transaction where you
3 could find something that looks like those 18 lines that you
4 produced in March of 2019, would have to replicate that for
5 every dealer who you had during that period of time, and what
6 software was being run. And that's a very burdensome
7 labor -- time intensive and costly process for a small company
8 that's lost a lot of its employees, at least in its technical
9 side.

10 The relevance of all that data for all the dealers is
11 minimal in your view. But you are offering to do something
12 that is much less burdensome. And I wasn't sure what -- that
13 changed overtime, it seemed to me, in the discussions you had.

14 So what are you now offering to do for certain -- you
15 mention 24 or something. I don't know what you're offering.

16 MR. HO: Ten CDK dealers and ten Reynolds data --
17 dealer rather.

18 MR. NEMELKA: Twenty.

19 MR. HO: So 20 total.

20 THE COURT: So you're offering to do what they're
21 asking for.

22 MR. HO: For one day.

23 THE COURT: Okay. And who is arguing this for your
24 side there?

25 Mr. MacDonald?

1 MR. MacDONALD: I am, your Honor.

2 THE COURT: Okay. So why is their offer not
3 sufficient?

4 MR. MacDONALD: Well, as your Honor referenced, the
5 polling client manager that contains information about what
6 files Authenticom polls, how long it polled for, when it
7 polled, how it polled. And Authenticom has told us they don't
8 otherwise track this information.

9 So polling client manager is really the only source of
10 instances -- of tracking instance Authenticom accesses
11 defendants's DMSs. Now obviously there are illustrative
12 reasons we want this that you mentioned. But also, as part of
13 our counterclaims, and defendants have counterclaims under the
14 Computer Fraud and Abuse Act, the Digital and Millennium
15 Copyright Act, and various other federal and state claims,
16 under those counterclaims, defendants need to be able to show
17 instances of wrongful Authenticom access. And Authenticom has
18 said they don't otherwise track this access.

19 And one of the problems we have is that, as you read
20 in the briefing, in the summer of 2018 Authenticom offered this
21 alternative log that they would produce to us to try to satisfy
22 us. And we took the deposition of Authenticom's 30(b) (6)
23 witness in April of this year. And it was the deposition
24 just -- this was a deposition just about data. And the first
25 topic in that notice was solely this issue of that alternative

1 log they produced. And their witness testified that that was
2 not -- this is a quote -- not an accurate representation of
3 polling, and that we couldn't rely on it for any of the
4 purposes to try to -- tended to show DMS access.

5 So the data they have on DMS access is stored in their
6 PCM log. They haven't retained it. They only have seven days.
7 And now they say they can't export it. And the alternative
8 data they gave us they say we can't rely on.

9 So if we don't get any better data -- and, again, this
10 is seven days, so it is going to be hard from that to do
11 extrapolation. It is not going to be great.

12 But if we don't get slightly better data, we are going
13 to come in here in a few months, and they are going to have
14 Daubert challenges against our expert saying, oh, you guys
15 relied on bad data. We told you it was bad data. But we don't
16 have anything else to rely on. So we're between a rock and a
17 hard place on this issue.

18 Now on the technical issues, we agree, we acknowledge,
19 we put to the side the spoliation issues. There are only seven
20 days of data. It is in a log. That's what their documents --
21 that's what their witnesses say. It is kept on their system.
22 The witnesses said, you can log in, you can look at this log,
23 whether you have to click on individual dealers or not, I'm not
24 sure. But somebody could log in and look at the last seven
25 days of polls right now.

1 Now we're willing to accept this in multiple forms if
2 it can be copy and pasted into a document, and we can do that.
3 Your Honor mentioned screenshots. We would accept it in the
4 form of screenshots that can be OCRd.

5 You know, if the manual difficulty of screenshots is
6 too high, and they want to set up a terminal for one of our
7 experts on the AEO basis to go in and manually create the log
8 themselves, we can do that. If it is easier to have a special
9 master do it, we can do that. Or we're open to alternative
10 solutions that would lessen the burden. But this is the only
11 place they store the data. That is what they have told us.
12 And this is data that we need.

13 THE COURT: Okay. I don't think I need a special
14 master here, thank God. And thankfully for you -- although her
15 rates are not outrageous. But I don't think I need a special
16 master here to understand this. I either underestimated myself
17 or overestimated the complexity of the issue that you have
18 here.

19 I -- from -- based on what I can read in the
20 documents, I think -- or in your briefs, I think -- and based
21 on what I saw in some of the deposition transcripts, the parts
22 that you did submit to me -- and I think you were -- were you
23 talking about Dane Brown's deposition?

24 MR. MacDONALD: No, this is Joe Noth's deposition.

25 THE COURT: Okay. Yeah, okay. That's -- you also

1 submitted that too, I think.

2 I think you are -- defendants are developing
3 information that potentially they could use to support their
4 theory of unauthorized access to your system. You describe
5 some of that information at pages 2 and 3 of your brief on this
6 issue, which is sealed. It is ECF 711.

7 Plaintiffs take you to task for saying, well, why are
8 they saying all this stuff? They're just trying to dirty us
9 up. True.

10 But it also to me illustrates the type of discovery
11 you're developing. And while I understand your issue of
12 Daubert, you know, I don't know how that ends up coming out at
13 trial if the other side didn't produce or said I couldn't
14 produce the information, but they did give you a sampling.
15 That's beyond my pay grade, at least at this point, to decide.
16 But I do think you're entitled to some information on this
17 topic.

18 I agree with the plaintiffs that the burden on a small
19 or shrinking company of going through the so-called ephemeral
20 data to find this for hundreds, if not more, customers or even,
21 frankly, many, many tens of customers is burdensome and not
22 proportional to the needs of the case. I think the proposal of
23 ten CDK dealers and ten Reynolds dealers for one day during
24 this period of time will provide the defendants with -- and I
25 don't care if it is a screenshot or however it is. I mean, I

1 am not going to micromanage that process.

2 But the information to show the polling data for those
3 CDK and Reynolds dealers, as best as I can, determine what
4 you're -- again, the relevance of this information is not that
5 it is the recipe for Coke, it is for you to illustrate that
6 this happens. And yet another way, in addition to what you
7 have already illustrated, and I'm -- I can't really, based on
8 the testimony that you're getting, I can't see how this is not
9 adequate for the purpose that you need it for. What I do know
10 is that requiring lots more is not proportional to the needs of
11 the case.

12 And, again, we're talking about one day in 2019, I
13 think. We're not talking about prior time. But probably the
14 information is still helpful to you.

15 But I -- so in substance, I think the information that
16 you're looking for has some relevance. The burden on CDK -- on
17 Authenticom of producing a complete seven-day set of
18 information -- of this information, I'm convinced, is unduly
19 burdensome and not proportional to the needs of the case from
20 what I understand the information will show and how it will be
21 used.

22 I do think that the proposal of ten CDK and ten
23 Reynolds dealers is much more proportional to the needs of the
24 case and will provide the defendants with some of the
25 information they're getting, at least on an exemplar basis.

1 And my understanding really of what the defendants
2 want is an exemplar basis because whether it is a full seven
3 days or it is a one day, you're looking -- you're not going to
4 get the entire history of the polling data, you're only going
5 to get a sample. So the only question really is how large the
6 sample should be. And, I mean, I don't know if ten is right or
7 12 is right or whatever. But I think that's within the realm.

8 Hold on for one second.

9 (Brief interruption.)

10 THE COURT: I'm thinking something. Hold on.

11 (Brief interruption.)

12 THE COURT: I take it, Mr. Ho, that the burden on
13 Authenticom really is in the process of querying the software
14 to get the information. So hypothetically if you did, you
15 know, ten exemplars for CDK dealers and Reynolds for day one,
16 and then for day three you did ten different dealers, they
17 would get 20 dealers for CDK and 20 for Reynolds on different
18 days, that would double your burden in the sense that you have
19 to look at two days.

20 Well, hold your answer to that for a second.

21 Mr. MacDonald.

22 MR. MacDONALD: Yes, your Honor, I --

23 THE COURT: Is your objection -- is your objection to
24 -- I mean, here's my problem with your argument. You're not
25 getting a statistically significant sample, in my view, under

1 any scenario for the entire time period that this occurred.
2 Whether they give you seven days, whether they give you a
3 rolling seven days or not, that's not a statistically
4 significant sample, I think. I mean, you know, I'm beyond my
5 pay grade on that too.

6 But what you are getting is an exemplar. And the only
7 question is how large that exemplar should be. So why is an
8 exemplar that shows ten CDK and ten Reynolds dealers on one
9 day, why is that materially less helpful to you, for example,
10 than seven days?

11 MR. MacDONALD: Well, your Honor, I'm not a
12 statistician either, but my understanding is the larger the
13 sample we can get, the -- you know, anything that we do here,
14 since Authenticom doesn't really track or keep this
15 information, is going to be an attempted extrapolation. There
16 is going to be some uncertainty there.

17 But a larger sample will give us slightly more comfort
18 in doing that sort of extrapolation to see kind of what they
19 are doing on a systemic basis, how often they are accessing our
20 systems, how often they are polling for certain types of files,
21 how often they are running certain types of scripts or running
22 circumvention on our security. So the larger the sample, the
23 better off -- the better data we would have.

24 And I also wanted to say, to the extent that we're
25 limited to 20 CDK dealers or, you know, ten CDK and ten

1 Reynolds dealers, however it is, defendants will request that
2 we get to pick the dealers that are used.

3 THE COURT: Okay. I know you're not a statistician,
4 but I don't buy your argument because what your argument really
5 sounds like is an exemplar argument. I mean, and you have got
6 testimony from Authenticom -- and I can't remember which
7 deposition it was in, but I read it. Maybe it is Noth -- that
8 Authenticom queried the system for hundreds of people -- of
9 dealers, I think. I mean, you have got that testimony, right?

10 MR. MacDONALD: But the issue, your Honor, is that
11 under some of the statutory claims that we have brought, the
12 Digital Millennium Copyright Act, each instance, each query is
13 its own statutory violation. So we need to be able to quantify
14 how many times they have queried our systems. Authenticom has
15 not produced very good data on that, so we're trying to
16 extrapolate it from a variety of sources. And this would be
17 one of our sources.

18 And, obviously, you know, a seven-day period in June
19 2019 is not the ideal data set, but it is better than nothing.
20 And it is better than just having kind of a limited set of
21 dealers.

22 THE COURT: Yeah, I mean, I think -- I'm not sure how
23 much better than -- this snapshot is proportional to the needs
24 of the case. Let me just look here for a second at what you
25 said in your briefs. Your brief.

1 (Brief interruption.)

2 THE COURT: Yeah, I mean, my guess from what -- you
3 know, I mean, I know plaintiffs say you gave me this
4 information to prejudice them. I don't know, not really. But
5 you're trying to give me a picture of why the polling data is
6 important because you have already established wholesale -- in
7 your view wholesale access to the CDK system. So one of your
8 bullet points on page 3 says, Authenticom had CDK dealers
9 install a program called Profile Manager and used a system
10 administrator-level account to automatically re-enable DMS
11 log-in credentials that Authenticom was using to extract data
12 from CDK's DMS within minutes after CDK's security measures
13 disabled them. And you cite the 30(b) (6) deposition of Brown,
14 right?

15 MR. MacDONALD: Yes.

16 THE COURT: And that's really what we're talking about
17 here, right?

18 MR. MacDONALD: Well, that's --

19 THE COURT: To some extent.

20 MR. MacDONALD: Well, seeing the actual scripts run is
21 to some extent also trying to quantify it.

22 THE COURT: Right. But you're never going to get all
23 the scripts that were run. Instead you are going to have
24 testimony that says this happened a lot, and here's an example
25 of what it looked like in June of 2019.

1 But you're never going to get, I don't think, today,
2 from data that disappears, what happened prior to that date.
3 So even if I were to give you seven days from today, yes, you
4 could argue that you could extrapolate that. Everything else
5 is arbitrary in terms -- and I still haven't -- I mean, given
6 that it -- what you're asking for, I think, is illustrative,
7 I'm not sure how a larger sample, other than it is just a
8 bigger illustrative set, gets you anywhere.

9 I mean, how are you going to use this -- you say you
10 are going to give this to your experts, but your expert is not
11 here. Or you tell me you're not a statistician. I think
12 Authenticom would have an interesting time with an expert who
13 says, based upon a seven-day sample in June 2019, this is how
14 often I think this happened for a four- or five-year period.

15 MR. ROSS: Your Honor, just to chime in briefly. This
16 is Brian Ross.

17 Before -- part of the problem is that we don't know
18 what the numbers are for these most recent seven days. But one
19 of the things that we would hope to do would be to establish a
20 bare minimum, a conservative estimate that our experts can
21 apply. If you see a similar number of instances over June -- a
22 certain week in June 2019, and you combine that with testimony
23 where Authenticom is saying, we have lost customers, and we are
24 accessing your systems much less often nowadays than we were
25 back in the 2015 to 2017 period, then we would hope to

1 establish a floor in terms of quantifying these improper
2 instances of access. So that would be one example.

3 Would that be ideal? Of course not, but it would be a
4 -- certainly better than what we have to work with now on core
5 elements of our claims.

6 THE COURT: Yeah. And you all say you want to
7 identify the dealers. So do you -- is part of your proposal --
8 I'm not going to give you a seven-day look at hundreds of
9 transactions. I'm just not. That's unduly burdensome, it
10 seems to me. And I don't think it is proportional to the needs
11 of the case, as I understand what this is going to be used for.
12 Even if it is a better sample for you for your expert. Because
13 although I don't have hard data from Authenticom on this, I
14 have the Clements's affidavit. And his affidavit at some level
15 convinces me that this is a labor intensive exercise for a
16 company that may not have the folks to do it. And it has got
17 to be expensive. And it has got to be real expensive.

18 Unless you want to pay for them to go through there
19 and reimburse them for the costs of doing this.

20 So I'm not going to give you seven days.

21 You hesitate. You'll pay for it.

22 MR. MacDONALD: Depending on the cost, we would
23 consider it, yes. Or, you know, as I said earlier, we're
24 willing to have an expert do it if they will give us a terminal
25 and --

1 THE COURT: I doubt that's happening.

2 Right, Mr. Nemelka -- Mr. Ho?

3 MR. HO: We would certainly object to that, your
4 Honor.

5 THE COURT: Yeah.

6 I mean, we're talking -- at a -- conservatively we're
7 talking about hundreds of dealers through this period of time.
8 Or at least a substantial number of more than ten.

9 I mean, another way to cut this is ten that you could
10 identify for the seven-day period. I mean, I'm not sure how
11 much incremental burden that imposes on Authenticom. Ten
12 dealers a day for seven days.

13 Or ten CDK, ten Reynolds for seven days.

14 MR. NEMELKA: We'll multiply the effort by seven.

15 MR. HO: And, your Honor, if I could just make one
16 observation about --

17 THE COURT: How long -- do you know -- yeah, you can
18 in a second.

19 MR. HO: Sure.

20 THE COURT: Do you know, just because the party that
21 is raising the burden usually has to quantify the burden, do
22 you know for Mr. Clements's -- let's me see. I'll look at
23 Clements's affidavit. Hold on.

24 (Brief interruption.)

25 THE COURT: Yeah, see, he talks about a -- he is

1 talking about the strawman here. Rewriting the software to be
2 able to get a -- yeah, I'm getting to the point where maybe
3 I -- well, if --

4 (Discussion off the record.)

5 THE COURT: Right. I mean, do you have any idea as
6 you sit here today how much time it would take for ten CDK
7 dealers and ten Reynolds dealers? I mean, because you're
8 making that proposal, you must have talked to somebody
9 technically to find out how -- and then you just multiply it by
10 seven. So how much time is that? Time and expense.

11 MR. NEMELKA: They didn't give me a specific time.
12 They told me it would take about a week to get it to me because
13 I wanted to know about timing if this -- if this is something
14 that was offered or accepted. So they said it would take them
15 about a week. I don't know how they divided up their -- they
16 only have about three or four people now in their development,
17 and so I don't know how they would divide up -- how that
18 divides up man hours.

19 MR. HO: But --

20 MS. MILLER: Your Honor, this is Britt Miller. And I
21 don't purport to have had a sneak peek at Authenticom software
22 so as to say how it operates. But drawing on my limited
23 computer science background, I would think that you could -- if
24 you had identified the same ten dealers and you write the
25 script to be able to query the system for those ten CDK dealers

1 and those ten Reynolds dealers, you could run that query as and
2 against seven of the days, and return the results. I.e., you
3 wouldn't have to rewrite the program or rewrite the poll or
4 rewrite the query because it is the same query, just changing
5 the date.

6 THE COURT: I would bet they are not talking about
7 writing a query, I would bet that they are talking about
8 manually going into the system and locating the stuff. Because
9 Clements talks about the burden on actually writing a program
10 to do this.

11 Am I right?

12 MR. HO: Yes, your Honor.

13 THE COURT: Yeah. I think what they are talking about
14 is putting somebody in front of a computer screen and looking
15 at this, you know, what the seven-day period and extracting
16 from the software database this information. And, again, this
17 is without prejudice to their argument that the, you know,
18 courts have said this, quote unquote, ephemeral data that
19 shouldn't have to be produced anyway. It is kind of like just
20 scrolling stuff.

21 Right, Mr. Ho?

22 MR. HO: Yes, your Honor. I think of it as sort of
23 footprints in the sand. I mean, they are only there for seven
24 days, and then they are washed away as in the ordinary
25 operation of the software program. And that's exactly the kind

1 of data that we ordinarily think of as too burdensome to have
2 to preserve, maintain, and then produce in discovery. And we
3 think that that ordinary principle ought to apply here.

4 If I could just make one observation about your
5 Honor's point that I think is well taken, that this can only be
6 for illustrative purposes. I mean, I'm not a statistician, but
7 a red flag, you know, is raised in my mind when I hear the
8 defendant saying, well, actually we'd like to pick the dealers
9 because a central principle of any kind of extrapolation is
10 that it be from a statistically random sample. So they are
11 skewing the sample by their very request to decide which
12 dealers to choose, which leads me to think this really isn't
13 about experts or about extrapolation, it is, as your Honor
14 suggested, about trying to find as many illustrations as
15 possible that they can use, however they intend to, in front of
16 the jury.

17 THE COURT: Yeah, I mean, I do think it is trial
18 presentation. At least that's my gut here. I don't think
19 you're -- you know, Mr. MacDonald's -- I mean, Mr. Ross's ears
20 perking up and saying, well, we'll pay for it. We'll pay for
21 it. We'll put an expert there. We'll find all this stuff. I
22 still kind of envision, which hopefully they are not going to
23 be in front of me, the Daubert arguments about whether -- what
24 information in June of 2019 has to do with something else.

25 But I suppose defendants would argue, since the

1 company is smaller and retrenched somewhat, it can only be
2 worse earlier on in the period.

3 MR. ROSS: And just to be clear, your Honor, one point
4 of clarification. Mr. Ho has mentioned this concept of who is
5 picking the dealers. Obviously the statistical significance of
6 this data is precisely why we wanted to get a production of a
7 full day or days, irrespective of anybody picking dealers. But
8 in a world where we are -- we understand the Court's comments.
9 And in a world where we are going to be limited to a limited
10 subset of dealers, that's why we would like at least the
11 flexibility to choose. And if -- if we decide to choose them
12 in a randomly generated way, we'll do that. But the --
13 ultimately that was why we thought we shouldn't be limited on
14 the number of dealers.

15 THE COURT: Well, and to say it differently, you don't
16 want them to pick them. You would rather -- if somebody is
17 going to pick, you would rather pick.

18 What -- do you know, Mr. Nemelka, what's the over and
19 under? What's the difference on whether I were to say, for
20 example, all the polling data for one day between June whatever
21 and whatever versus ten CDK dealers for one day? I guess
22 depending upon how many dealers you're running, it could be
23 hundreds as opposed to ten, right?

24 MR. NEMELKA: Yeah, it's -- that's just very
25 burdensome. It is the seven dealers -- excuse me -- the 20

1 dealers over seven days is much less burdensome than doing all
2 of one day, by an order of magnitude.

3 THE COURT: So might I assume if it takes one week for
4 ten and ten, it would take two weeks for 20 and 20, right? Or
5 it would take two weeks for ten and ten over two days, right?
6 Probably, right?

7 MR. NEMELKA: Probably, that's right.

8 MR. HO: And, your Honor, more than just the number of
9 hours, this is a company that is on a -- you know, trying to
10 run a business at the same time and has been reduced to the
11 absolute bare number of people -- minimum number of people that
12 is required to continue to operate its business. So to take
13 one of those people and say, you have got to spend a week or
14 two weeks trying to find data for these, even, 20 CDK and
15 Reynolds customers is still a very significant burden on
16 management.

17 MS. GULLEY: Your Honor?

18 THE COURT: Yes, Ms. Gulley.

19 MS. GULLEY: Thank you. Sorry. I wasn't sure whether
20 there was a window. I was waiting for a window. Can I make
21 some comment for -- momentarily?

22 THE COURT: Sure. Now we will have a one, two, three,
23 three lawyers arguing for Reynolds and Reynolds.

24 MS. GULLEY: I'm so sorry, your Honor.

25 THE COURT: That's okay. We have got two for CDK, so

1 we have got the whole family in here.

2 MS. GULLEY: Okay. Well, thank you. So I just want
3 to address a couple of issues that you raised. First of all, I
4 appreciate that you are not addressing the spoliation issue
5 today. Obviously there are bigger issues. There are *prima*
6 *facie* elements that the defendants say in having to prove their
7 counterclaims, you know, that where we sent them hold orders
8 long, long ago and have asked for the type of data for a long
9 time, which we're just learning the data that we got wasn't
10 good enough.

11 With respect to the burdens, we understand, you know,
12 that this employee situation with the reduced forces that
13 plaintiffs put in their recent motions has been something that
14 they have been putting in their motions since this case was in
15 front of the Seventh Circuit, and after which Mr. Cottrell made
16 his statement to the press that the company was well positioned
17 and battled. That came after those layoffs when he made that
18 statement. We have talked about this many times.

19 Nevertheless we appreciate the burdens of this.
20 Reynolds and CDK have also had significant burdens. In polling
21 the transactional data that the plaintiffs requested, Reynolds
22 has to essentially shut down its accounting system every night
23 for months to pull that and had to pay tens of thousands of
24 dollars to buy additional server space.

25 So as an order of magnitude, we're talking about two

1 weeks for them. We have worked on this for months and months
2 and months. Because it goes to elements of the plaintiffs's
3 case, we have had to do that. This goes to a core element of
4 the defendants's case.

5 I understand that now, given that the plaintiffs have
6 continued to delete that information on an ongoing basis since
7 the case began, we only have seven days, but seven days is
8 better than zero days.

9 THE COURT: Okay. I hear you.

10 (Brief interruption.)

11 THE COURT: You know, there is nothing in -- I'm
12 re-reading the defendants's brief on this, which is sealed as
13 ECF 711. And really the whole import of what defendants are
14 arguing there is the illustrative purpose of this data rather
15 than, you know, a huge -- I'm interpreting it as more of a -- I
16 don't know how this gets you -- there is no affidavit from an
17 expert that says, I need seven days of data, for example, for X
18 number of Y dealers.

19 What you say at page 7 is the PCM log, which is
20 ephemeral data, I'm convinced, even though it would only
21 contain data for a limited time period, may be the only means
22 through which defendants can understand Authenticom's polling
23 activities on a poll-by-poll dealer-by-dealer basis. So it is
24 an attempt to understand kind of what's going on. Maybe I'm
25 putting too much weight in that.

1 Okay. I want to take a really quick break here. We
2 have been going since 9:30. I know I have an 11:15 criminal
3 hearing, which everybody has not yet arrived for. My intention
4 is to end you there.

5 Was there anything else you wanted me to deal
6 with -- I understand -- I guess there is -- there are a couple
7 of things that I would like to deal with with you. I want to
8 make sure I know when the documents are going to be produced.
9 I want to know of the remaining things under advisement what
10 your priorities are.

11 MS. MILLER: All of that -- your Honor, this is Britt
12 Miller. I'll let Mr. Provance speak as to when we can get the
13 documents to you.

14 As to other matters that remain under advisement,
15 Docket 539 and docket 543, which are defendants's motions to
16 compel production, they were both listed on the May 15th status
17 hearing report --

18 THE COURT: Uh-huh.

19 MS. MILLER: -- which actually implicate a number of
20 issues that your Honor ruled on with respect to CDK today.

21 THE COURT: Well, isn't 539 your motion to compel
22 Authenticom, which gets taken care of by what I am doing here
23 or is this more in --

24 MS. MILLER: No, this is a -- this is the motion to
25 compel Authenticom to produce communications off of their log.